Juror Questions in Civil Cases: Opening Pandora's Box or Newest Tool for Juror Engagement?

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Picture a witness getting questioned on the stand. Did you may think of *My Cousin Vinny* or *Law & Order: SVU*? Chances are you imagined dramatic moment where the lawyer asks the one question that blows the case wide open. But what if jurors could ask questions as well?

Despite being an experienced trial attorney in both federal and state court with a master's degree in legal and forensic psychology, it was not until last summer during a two-week trial in Dallas County that I experienced this practice first-hand. This trial was an opportunity for me to expand my jury science specialty, specifically in regard to the practice of jurors asking questions—through the judge—during trial. While juror questioning varies greatly depending on the courtroom due to judicial discretion, but, generally, judges who allow the practice ask jury members to write any outstanding questions they have for a witness at the end of the attorney-led examination and any questions not objected to by attorneys are then asked of the witness by the judge. This practice balances juror anonymity and neutrality while also leading to an overall increased level of engagement and dedication of the jury.

This article discusses the historical context of juror questioning, as well as the benefits, concerns, and the practical implications for civil cases. At bottom, the practice of jurors asking questions does not appear to be subsiding. In fact, it continues to grow—judges, lawyers, witnesses, and prospective jurors should all be aware of what this looks like for the future.

History of the Jury Trial – The Cornerstone of the American Justice System

Jury trials in the United States have a rich history, dating back to 1630 in the American Colonies (Commonwealth of Massachusetts, *n.d.*). In fact, allowing lay people—or, individuals with no legal training—to take an active role in deciding the outcome of a case is one of the renowned foundations of the American legal system.

In civil cases, the trial judge determines the appropriate law and makes legal determinations, the lawyers present their cases through documentary evidence and witness testimony, and up to twelve individuals determine which facts are credible and which are not. Those individuals, and those alone, are responsible for determining the outcome of all types of civil legal cases. It is the cornerstone of the American legal system: the right to a trial by a jury of one's peers.

For years though, the number of jurors summoned and the positive outlook for serving on a jury has trended down (Gramlich, 2020). From 2000 to 2022 there was an overall decrease by 44.67%

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in jury summons sent out and a decrease of 57.04% in jurors seated (US Courts 2022; 2000). There has also been a drastic change in the perception of jury duty by generation: while 70% of Americans above age 30 said that serving on a jury "is part of what it means to be a good citizen," only 50% of those aged 18-29 agreed with that statement (Gramlich, 2020). And if you walk into virtually any court during jury call (where prospective jurors gather and wait to be assigned to court rooms and where attorneys will ask questions of them to determine selection), the faces are typically ones of frustration, boredom, and irritability.

It begs the question: if the jury trial is to remain the cornerstone of our legal foundation, what can be done to increase juror engagement in civil cases? The answer may be contrary to what some would consider common-sense: allow jurors with no legal training the opportunity to be even more involved throughout the trial.

The Evolution of Juror Question-Asking: Where the Law Stands

Although this is not a new concept (Diamond, Rose, Murphy & Smith, 2006), it wasn't until the early 2000s that the American Bar Association endorsed juror questions (ABA, 2005). The Federal Rules of Evidence neither expressly prohibit nor permit the practice of juror questions, but over the last few decades the practice has continued to gain traction in state courts (Federal Rules of Evidence, 2020). As shown in Table 1, all but seven states have passed laws related to jury questions as of January of 2022, and these laws trend strongly in favor of support.

Specifically, in civil cases, six states—Arizona, Colorado, Florida, Nevada, Washington, and Wyoming—now *require* juror questions; thirty-four states *encourage and permit* courts to allow juror questions; seven states have yet to speak on this issue; and only three states—Maine, Nebraska, and Louisiana—*prohibit* it.

While the practical application of juror questions varies from state-to-state, and judges usually have discretion to employ procedures that work for them, almost all states follow some form of the following steps:

(1) Allow jurors to write down questions once the parties finish examining the witness;
(2) Collect any questions—typically performed by the bailiff;
(3) Review by the judge to screen the questions, often to determine if they are proper for the witness on the stand and comply with the relevant rules of evidence procedure;
(4) Conference between judge and the parties' attorneys to allow an objection to the questions to be lodged;
(5) Ask any remaining questions by the judge to the witness; and
(6) Potential follow-up from attorneys or judge.

Many jurisdictions prohibit the use of jurors verbally questioning witnesses themselves, and for states which have not yet directly addressed the issue, it is unlikely that this trend will change. In addition to being further removed from the jurors asking the questions, one benefit of writing questions down is to protect juror anonymity. If a court is going to allow jurors to ask questions of witnesses, it is typical that the judge will provide these instructions at the beginning of the trial, as well as a warning that not every question will be approved or asked. The jury is then instructed

not to hold it against the parties if their question is not asked because the judge has ultimate authority to decide.

The Benefits and Drawbacks: Multiple Perspectives from Various Viewpoints

But what is maybe the most pressing question of all: is this process actually beneficial? Research supports the conclusion that it is.

The seminal study in this area, as well as that which followed it, highlighted the many benefits of allowing jurors to ask questions (Penrod & Heuer, 1997). Overall, reception in the legal field from judges and attorneys alike has been positive, with multiple judges speaking out publicly in favor of the practice (Mott, 2003). The practice is largely well-respected due to (1) increased juror engagement; (2) increased juror understanding; (3) support from jurors, attorneys, and judges alike; and (4) because it promotes public trust in the justice system.

> ***Engagement.*** Prospective jurors are typically reluctant to spend their time serving on a jury. This can lead to disengagement and frustration on the part of the jury. It is a natural human tendency to want to ask questions as they arise in our minds, and, unsurprisingly, jurors who are able to do that—or able to do some version of that—find themselves more engaged with the process. Judge David R. Herndon of the U.S. District Court for the Southern District of Illinois stated, "when doing exit interviews—speaking to a jury post-verdict—and asking how the jury felt about the ability to forward questions to the court for witnesses, jurors have confirmed that they felt more vested in the proceedings and that it made the trial even more interesting for them." (Smith & Herndon, 2016, p. 2).
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> Judge N. Smith of the U.S. Court of Appeals for the Ninth Circuit, who opposes this practice, acknowledges the benefits of "encouraging jurors to be more attentive and interested in the proceedings," but notes that there are other methods that he feels are less prejudicial which he applied as a state district court judge, including jury instructions at the beginning and end of the trial, allowing for note taking, and emphasizing the importance of the jurors' role in the judicial process (Smith & Herndon, 2016, p. 2).
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> ***Understanding.*** Jurors take jury duty seriously, but this means they need to understand a case in order to make an informed decision (Smith & Herndon, 2016). Juror questions allow for this. By becoming active participants in the courtroom, jurors get a more in-depth understanding of courtroom procedures, are less likely to misunderstand the facts of a case, and develop a clearer perspective on which laws apply or do not apply to the case. On average, the research supports that jurors take this job seriously, although they do not ask questions just for the sake of it (Mott, 2003). Jurors are judicious about questions submitted, and over half of the time, their questions are not objected to and asked (Mott, 2003; Penrod & Heuer, 1997). A juror's ability to ask questions in real-time, rather than waiting days (or even weeks, in some cases) to discuss these questions, but not hear from witnesses again, yields better results than the alternative (Diamond et. al, 2006).
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> ***Lawyer, Jury, and Judicial Support.*** Allowing jurors to ask questions is also beneficial to the lawyers presenting the case, as it allows them to glean information about what the jury

thinks is important, what they are confused about, and what they want to know more about (Penrod & Heuer, 1997). Heuer and Penrod found that prior to litigating a case in which jurors were allowed to ask questions, lawyers took an unfavorable view of the practice but that after experiencing juror questions, attorneys evaluated the procedure more favorably. Judges felt similarly: neutral prior to implementing the practice, but favorable once the first trial finished, and even more favorably once she or he improved and streamlined her or his practice. Unsurprisingly, jurors were the group that rated the practice with the highest satisfaction.

Promotes Public Trust. Oftentimes, lawyers generally—and trial lawyers specifically—get a bad rep for making too many objections, attempting to exclude evidence, and otherwise taking zealous advocacy a step too far. What lawyers understand as a normal part of trial advocacy dictated by the rules of evidence can appear deceptive by jurors. But when jurors have some amount of control over what questions are asked and what information is brought to light, there is an increased level of trust that grows between the jurors and the attorneys and judges (Penrod & Heuer, 1997).

While there is substantial support for this practice in the legal community, there are those who disagree with this practice. Of those who think that jurors should not be able to ask questions and feel that that the potential negatives outweigh the positives, their concerns are in four main areas: (1) misuse of judicial resources and time; (2) the role of juror turning from neutral to advocate; (3) impermissible questions potentially leading to appeals; and (4) jurors giving unfair weight to their own questions instead of those of the attorneys.

Adding time to the trial. Questions are typically asked at about a rate of one question per every two hours of trial time, and usually only adds about 30 minutes of total trial time to a case (Penrod & Heuer, 1997). But the larger (or more high-profile) the case is the more questions are asked—and therefore more time in trial, sometimes elongating trials by multiple days (Winter, 2014). For a legal system already facing a backlog, this is a very real concern for judges and litigants across the country.

Lack of neutrality. The single largest area of concern is the potential for jurors to turn from neutral arbiters to advocates. Chief Judge Lay of the Eight Circuit observed that "Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct," making his view clear (*United States v. Johnson*, 1989). But from a research perspective, there was no statistically significant difference in perceived juror neutrality when comparing cases where jurors could ask questions to those where they could not (Penrod & Heuer, 1997).

Impermissible Questions. Another chief concern is that because jurors do not know the rules of evidence, they will ask impermissible questions. No doubt this can occur. For example, the South Carolina Supreme Court found an abuse of discretion where the trial judge permitted a juror to request, through a question, that a witness provide a photograph not previously introduced into evidence (*Day v. Kilgore*, 1994). And it is certainly possible

that jurors may write impermissible questions, specifically with regards to character evidence, that can open the door for impropriety. But research demonstrates that, on the whole, jurors ask appropriate questions and within the bounds of what is relevant and important in the case. Further, as discussed above, the judge has ultimate authority to decide which juror questions are relevant to the case.

Improper weight on their own questions. Going hand-in-hand with the last two areas of apprehension, is the potential for jurors to give disproportionate weight to the answers to their questions—rather than the questions asked of witnesses by attorneys—and the potential for jurors to hold a grudge if their questions are not asked. And although this is possible, research shows that allowing jurors to ask questions assists them in getting to the truth, and disproportionate weight is not given (Penrod & Heuer, 1997).

While these lists are not exhaustive, both proponents and opponents of the practice have reasonable points. Regardless, with the majority of states leaning towards allowing jurors to ask questions, the question is not "if" this will continue in the future, but how to approach it when it does.

The Future of the Legal Practice: Practical Tips for Prospective Jurors, Expert Witnesses, and Lawyers

With forty-two states currently permitting or requiring juror questions—regardless of anyone's personal views—everyone involved in civil jury trials must be prepared for this new reality in courtrooms. And this goes for more than just the judges who oversee their courtrooms. There are various practical considerations for (1) prospective jurors; (2) witnesses—especially expert witnesses; and (3) lawyers.

Prospective Jurors. It's no secret that most people aren't overly excited at the idea of jury service, but this shift in 'normal' jury service may make the practice slightly more appealing. Jurors should be prepared not only to take notes—as most courts now allow—but to jot down questions they have throughout the trial. Those who serve on juries in courts who permit question-asking, will have the ability to tangibly impact the trial by asking questions and getting answers prior to deliberation. No longer will jurors sit in confusion for days or weeks thinking about a fact that may or may not be relevant to the case. This close-to-real-time interaction with the judge and witnesses will allow jurors to feel more in control.

Expert Witnesses. Expert witnesses are, as the title suggests, highly trained, educated, and skilled in their area of expertise. Some expert witnesses testify at trials as a close-to-full-time job. Those expert witnesses may have to be open to a new form of preparation now that they know they will be facing questions from the jury. Experts will be able to determine what jurors are not understanding from the questions that they are asked, and should be prepared to re-explain concepts they have already testified about using different language or examples (Diamond et. al, 2006).

Lawyers. Finally, if given the opportunity, lawyers should assent to this practice. Even if an attorney objects to every question that the jury proposes asking, they will get a window

into the jury's mind that they would not otherwise have. Instead of looking at twelve blank faces, with no guidance whatsoever into their thought process throughout the trial, attorneys for both the plaintiff and defense will have the opportunity to course-correct in real time based on what the jury does or does not understand or care about.

Just as the Constitution is known for being living and breathing, so too is the American Justice System. For centuries, jury trials have been a cornerstone of the justice system, and this streak does not appear to change anytime soon. Instead, all who are touched by civil jury trials must prepare for the evolution of the practice to include yet another voice in the court room: jurors. And, as for whether juror questions in civil cases opens Pandora's box or is a new tool for engagement, I'll let you decide for yourself. But I unequivocally agree with the latter.

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Table 1

State Laws Regulating Juror Questioning in Civil Trials

Require Juror Questioning	Allow Juror Questioning	Prohibit Juror Questioning	No Data (Civil)
• Arizona (Ariz. Rule Civil Procedure 40(i)(2)) • Colorado (Colo. Rule Civil Procedure 47(u)) • Florida (Fla. Rule Civil Procedure 1.452(a)) • Nevada (Nev. Short Trial Rule 24) • Washington (Wash. Superior Court Civil Rule of Procedure 3(k)) • Wyoming (Wyo. Rule of Civil Procedure 39.4)	• Alabama (*Prather v. Nashville Bridge Co.*, 286 Ala. 3, 3 (Ala. 1970) • Alaska (Alaska Pattern Jury Instr. Civ. 1.12) • Arkansas (*Ratton v. Busby*, 230 Ark. 667 (Ark. 1959)) • California (Cal. Rule of Court 2.1033. 2.1035) • Connecticut (Conn. Rule Superior Court 16-7) • Georgia (*Steele v. Atl. Maternal-Fetal Med., P.C.*, 610 S.E.2d 546, 552 (Ga. Ct. App. 2005) (overruled on other grounds)) • Hawaii (Haw. Rule of Civil Procedure 47(c)) • Idaho (Idaho Rule of Civil Procedure. 47(g)) • Illinois (Ill. Supreme Court Rule 243) • Indiana (Ind. Rule of Evidence. 614) • Iowa (*Rudolph v. Iowa Methodist Ctr.*, 293 N.W.2d 550, 553 (Iowa 1980)) • Kansas (*State v. Hays*, 883 P.2d 1093, 1097 (Kan. 1994)) • Kentucky (K. Rue of Evidence 614(c)) • Massachusetts (Mass. Rule of Evidence 614(d)) • Michigan (Mich. Rule of Civil Procedure 2.513(I)) • Minnesota (*State v. Costello*, 646 N.W.2d 204 (Minn. 2002)) • Missouri (Mo. Sup. Ct. R. 69.04) • Montana (Mont. Rule of Evidence 611(a)(1)) • New Hampshire (N.H. Superior Court Rule 38(b)) • New Jersey (N.J. Court Rule 1:8-8(d)) • New Mexico (N.M. Civil Jury Instructions) • New York (*Sitrin Brothers, Inc. v. Deluxe Lines, Inc.*, 231 N.Y.S.2d 943, 946 (N.Y. Cty. Ct. 1962)) • North Dakota (N.D. Rule of Court 6.8) • Ohio (Ohio Rule of Civil Procedure 47(F)) • Oklahoma (*White v. Little*, 268 P. 221 (Okla. 1928)) • Oregon (Or. Rule of Civil Procedure 58(B)(9)) • Pennsylvania (*Boggs v. Jewell Tea Co.*, 109 A. 666, 668 (Penn. 1920)) • Rhode Island (R.I. Civil Jury Instruction 107) • South Carolina (*Day v. Kilgore*, 444 S.E.2d 515, 518–19 (S.C. 1994)) • Tennessee (Tenn. Rule of Civil Procedure 43A.03) • Texas (*Hudson v. Markum*, 948 S.W.2d 1, 2–3 (Tex. App.—Dallas 1997, writ denied))	• Louisiana (LA. Pattern Civil Jury Instruction) • Maine (Traverse Juror Handbook for State of Maine) • Nebraska (Neb. Civil Jury Instruction)	• Delaware • Maryland • Mississippi • South Dakota • Vermont • North Carolina • West Virginia

- Utah (Utah Rule of Civil Procedure 47(j))
- Virginia (*Snead v. Vir. Elec. & Power Co.*, 17 Va. Cir. 534, 535 (Va. Cir. Ct. 1978))
- Wisconsin (*Sommers v. Friedman*, 493 N.W.2d 393, 400 (Wisc. Ct. App. 2008))